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UNCLAS ACCRA 002303

SIPDIS

SENSITIVE

PASS TO DEPT. OF COMMERCE FOR RASHIDA PETERSEN

E.O. 12958: N/A

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SUBJECT: GOVERNMENT OF GHANA'S MIXED RESPONSE TO WESTERN  
WIRELESS INTERNATIONAL'S ARBITRATION FILING

REF: ACCRA 01980

11. (SBU) Summary. The Ministry of Justice (MoJ) has responded to Western Wireless International's (WWI) filing for international arbitration under UNCITRAL rules (reftel). The MoJ claims that WWI is restricted by contract to settling disputes with the GoG in Ghanaian courts under Ghanaian law and therefore, the GoG will not submit to international arbitration. WWI counters that it has the right to file and it will pursue the case regardless of GoG participation. A contradictory statement from the National Communications Authority (NCA) on November 22, however, states it will respond to Westel's desire for arbitration. End Summary.

#### THE MOJ'S RESPONSE

12. (SBU) A letter from the Ministry of Justice (MoJ) to WWI dated November 4, says that Westel's License Agreement with the GoG requires any arbitration be carried out under the Ghana Investment Promotion Act (GIPC) of 1994. The letter states that Westel's primary investor, WWI, is therefore also bound by the agreement. The letter concludes by saying the MoJ will not submit to UNCITRAL arbitration out of respect for the terms of the License Agreement. WWI's response on November 12 asserts that WWI and Westel are legally separate entities and that WWI, not Westel, filed for arbitration. In addition, WWI quotes portions of the GIPC, which appear to give direct investors like WWI the express right to file for arbitration under UNCITRAL rules.

#### MIXED MESSAGE FROM THE NCA

13. (SBU) Westel's managing director Bill Taylor told EconOff WWI would go forward with the arbitration process regardless of GoG participation. He feels the MoJ's refusal to participate in arbitration is either a delaying tactic or an attempt to call WWI's bluff. In response, Westel made its case directly to the public November 16 with a full-page explanation of its position in Ghana's two most prominent newspapers: The Ghana Times and Daily Graphic. The NCA, which the bulk of WWI's complaint is directed against, responded on behalf of the GoG November 22 with similar advertisements in both papers. Both parties stick to their previously stated positions (reftel) and neither appears to provide room for reconciliation. In contrast to the MoJ's letter, the NCA's response concludes "Though it was the wish of the NCA to have had a speedy resolution of this matter without resorting to the courts or other legal processes, the NCA has no choice than to respond to Westel's desire for arbitration."

#### CHANCE FOR A SETTLEMENT

14. (SBU) Bill Taylor says he spoke with Minister of Communications Kan-Dapaah --who's Ministry nominally controls the NCA-- at a recent public event and both men expressed the hope that a settlement could be reached. Taylor explained Westel would drop its case if the GoG would rescind either the USD 25 million penalty or USD 27.5 million spectrum fee (reftel). Kan-Dapaah has not responded formally, but that is no surprise with December's elections looming.

#### COMMENT- POSSIBLE CONSEQUENCES OF ARBITRATION

15. (SBU) In Post's view the filing for arbitration under UNCITRAL rules is a desirable outcome. Whether the GoG eventually decides to participate in the arbitration process or not, WWI will go forward. In any event it is the proper venue for the settlement of international investment disputes. If the GoG does not participate they risk a considerable adverse award. WWI is seeking USD 190 million, but admits confidentially an award of USD 60 million is more likely. Regardless of the amount, if the GoG refuses to pay the consequences could be dire: Section 527 of the Foreign Relations Authorization Act mandates that the USG cutoff all foreign aid and vote against IFI loans if a country fails to pay an arbitration award within 3 years. It is unlikely the GoG would take such a risk for a case that could be settled safely out of court after the elections. Post is concerned that the GoG appears to be replaying past mistakes--similar efforts were made in an attempt to avoid arbitration over

VALCO--and will raise our concern with GoG officials. End  
Comment.  
YATES